IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 86.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

LEIGH ROBINSON AND CONWAY ROBINSON, JR., EXECUTORS OF THE LAST WILL AND TESTAMENT OF CONWAY ROBINSON, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF THE DEFENDANT IN ERROR.

Your special attention is called to the *stipulation* (Rec., pp. 61 to 65). This stipulation does three things, viz:

1st. It brings into the record and makes part of the record certain papers and proceedings which had been accidentally omitted therefrom (Rec., pp. 61, 62).

2d. It supplies, cures, and corrects certain errors, omissions, and mistakes in said record (Rec., p. 62 *et seq.*).

3d. It stipulates and agrees that under the notice to plead, acceptance of service, and rules of the supreme court of the District of Columbia, plaintiff in error was required to plead to the amended declaration on or before Tuesday, December 7, A. D. 1886, that being the first day of the first special term of the court occurring twenty days after service of said amended declaration and notice to plead (Rec., pp. 64, 65).

To the original declaration plaintiff in error pleaded the general issue—*i. e.*, not guilty—and the statute of limitations—*i. e., actio non accrevit infra unum annum* (Rec., p. 6). Defendant in error joined issue upon the plea of not guilty and demurred to said plea of limitations (Rec., pp. 7, 8).

Plaintiff in error says "the case stood in that condition, *without any disposition of the demurrer, until February* 18, 1884, *when the death of the plaintiff was suggested by his attorney*" (Their Brief, p. 1).

This statement is not true, and the record shows the facts to be just the other way. On January 26, 1883, defendant filed its *joinder* in plaintiff's demurrer to defendant's second plea to the original declaration (Rec., p. 61), and on March 10, 1883, the court *sustained* said demurrer by the following entry upon its minutes, viz:

"March 10, 1883.—Upon hearing the plaintiff's demurrer to the defendant's second plea, it is considered that said demurrer be, and the same is hereby, *sustained*" (Rec., p. 61).

ABATEMENT.

In oral argument in this court the attorney for plaintiff in error said:

"From February 18, 1884, when the death of plaintiff was suggested, to October 29, 1886, when the amended declaration was filed—a period of more than two years—no appearance being entered or proceeding had, the action abated."

Substantially the same statement is found in his brief, p. 43.

So far as page 8 of the record, to which he referred, is concerned, nothing appears on that page between these dates; but, nevertheless, the record shows that during that interval the following proceedings were had, viz:

"On July 5, 1884, a certificate of the register of wills of this District of the due appointment and qualification of Leigh Robinson and Conway Robinson, Jr., as executors of the last will and testament of Conway Robinson, deceased, was filed."

"July 5, 1884.—Now comes here Mr. Robinson, attorney, and says that Leigh Robinson and Conway Robinson, Jr., have been duly qualified as executors of said decedent by the orphans' court of this District, and move the court for leave to prosecute the said suit in the place of said deceased against the said defendant; and thereupon it is ordered that the appearance of said Leigh Robinson and Conway Robinson, Jr., as executors as aforesaid, be and the same is hereby, now made of record; that said suit stand revived in their names and be in the same plight and condition as when the plaintiff departed this life."

"Nov. 28, 1884.—On motion of the plaintiffs, by their attorneys, leave is granted them to amend their declaration as they may be advised."

(Rec., pp. 61, 62.)

The action was, therefore, duly, regularly, and properly revived, and long before the time for so doing had expired. It is only necessary to say here that this question is fully and elaborately reviewed, considered, and treated of in chapter I of our former brief (pp. 5 to 17), which we request you to read and to which we have nothing to add except to say that in the Court of Appeals the attorneys for plaintiff in error, when their attention was called to the foregoing proceedings, brought into the record by said stipulation (Rec., pp. 61, 62), frankly said in open court that they had overlooked the same, and then and there *admitted* that the action

had been duly, regularly, properly, and in due and ample time revived by the defendants in error, and that said action had not abated.

We call your attention specially to the following errors, which are corrected by said *stipulation:*

The second paragraph on page 19 of the Record, instead of reading as it now does on that page, should read as follows:

"The plaintiffs, to maintain and prove the issues on their part joined, offered and read in evidence their testator's title deeds and title papers, *evidencing a good, complete, and continuous title from February* 18th, 1880, *down to the institution of this suit, on August* 28th, 1882, when their testator, Conway Robinson, was, and from May 7th, 1870, had been, the fee-simple owner of the piece or parcel of land and premises described, and referred to in the declaration, the same being a tract of land containing 74 acres 2 roods and 3 perches, called the Vineyard," &c. The error is corrected by said *stipulation* (Rec., p. 63).

In line 14, page 21 of the Record, the word "*way*" should be "*road.*" For the correction of this error see Rec., p. 63.

In the last line, page 23 of the Record, the word "*supposed*" should be "*superficial.*" For the correction of this error see Rec., p. 63.

In line 6, page 24 of the Record, the word "*examined*" should be "*resumed.*" For the correction of this error see Rec., p. 63.

In line 3, page 28 of the Record, the word "*roads*" should be "*loads.*" For the correction of this error see Rec., p. 63.

In line 7 of paragraph 12, on said page 28, the word "*use*" should be inserted so as to make the text read "and what *use* was made of the same." For the correction of this error see Rec., p. 63.

About the middle of page 33 of the Record the word "*kept*" should be "*worked,*" so as to make it read "who worked this Agg road." For the correction of this error see Rec., p. 63.

In line 5 of paragraph 7, page 41 of the Record, the word "*county*" should be "*country.*" For the correction of this error see Rec., p. 63.

In the top line, page 57 of the Record, the word "*from*" should be inserted, so as to make the text read, "and *from* the fact that it was done." For the correction of this error see Rec., p. 64.

Numerous *other* errors, mistakes, and omissions, corrected by said stipulation, are so manifest to the eye of the reader that we deem it unnecessary to specifically point them out.

TWELFTH PRAYER OF DEFENDANT IN ERROR.

Proof of the eight or nine matters of fact enumerated in this prayer had been given in evidence during the trial. In this instruction the court scrupulously avoids telling the jury *what weight as evidence* is to be given by them to these matters, either collectively or separately. The *weight* of these respective matters as evidence is left absolutely and entirely to the jury; they can give as little weight or as much weight to them or any of them which the jury may believe as they, the jury, may think the same ought to receive. All that the court tells the jury is that these facts or any of them which the jury may believe *would tend to prove* the plaintiff's side of the issue which they had to try. Whether the evidence concerning each of these matters of fact *tended to prove* the plaintiff's side or the defendant's side of such issue was properly a matter of law for the court to decide and to instruct thereon. The jury were not supposed to know the law upon this subject, or to know whether the evidence concerning each of these matters tended to prove the *one side* or the *other side* of such issue, except as they received the law from the court. They were not lawyers, and might not have realized that some of these matters of fact had any *relevancy* or *tendency* to prove either side of such issue unless in-

structed by the court upon the subject. To refuse to tell the jury whether these matters of fact *tended to prove* the *one side* or the *other side* of the issue would have been to submit a mixed question of law and fact to the jury without giving them any instruction or idea as to the law upon or applicable to the subject.

This twelfth prayer, while *merely telling the jury* that these eight or nine matters of fact which are enumerated in this prayer or any of them which the jury may believe "*would tend to prove*" that said lane or road was not a common or public highway, and "*would tend to rebut any presumption of its being*" a common or public highway, most carefully instructs the jury that these matters of fact, or any of them which the jury may believe, "*are to be considered in connection with the other evidence in the case*," and so guards against these matters of fact, either separately or collectively, being by the jury segregated from the other evidence in the case or considered by themselves; and this is still more positively emphasized by the succeeding language of this prayer, in which the court, with marked clearness, says, "and if the jury UPON THE WHOLE EVIDENCE believe that said lane or road was not *such* a highway (*i. e., a common or public highway*), at the time of the acts complained of, which have been given in evidence, and was not a highway by dedication, then they should find the issue joined upon the defendant's third additional plea of highway in favor of the plaintiffs."

Furthermore, the court, in its charge, after reading this tweifth prayer of defendant in error to the jury, said:

"Gentlemen, that is a long instruction, but it is very simple. It recites merely the facts which the plaintiffs rely upon to rebut the presumption of a grant or to rebut the idea of a road by prescription being there. *The instruction does not tell you that if you find those to be true that there is no road by prescription*, but the instruction tells you that you are to consider all those facts recited there; that they have *a tendency to rebut*

the idea of prescription, and that you should consider them *in connection with all the other evidence in the case* THAT TENDS TO SHOW PRESCRIPTION, AND THAT TENDING AGAINST IT, if there be any that is not, recited in that instruction, *and that it is for you to say,* WHEN YOU HAVE CONSIDERED ALL THOSE MATTERS TOGETHER, *whether there is a road there by prescription.* That is what that instruction means" (Rec., p. 52).

In chapter IX of our former Brief (our Brief, pp. 123 to 150), which we request you to read, we take up each of these matters of fact recited in the twelfth prayer of the defendants in error and show that *each* of them *tends to prove* our side of said issue.

It only remains to say that the trial court in its charge to the jury and in the various prayers which it read to the jury as parts of its charge instructed the jury fully as to what would constitute a statutory highway (Rec., pp. 48 to 50), as to what would constitute a highway by prescription (Rec., pp. 50 to 52), and as to what would constitute a highway by dedication (Rec., pp. 54, 55), and instructed them fully as to what facts would establish a highway in each of these respective ways, and not only told them just how they were to determine whether there was a statutory highway, a prescriptive highway, or a dedicated highway, but also gave them the law which would enable them to determine the width of any such highway (Rec., pp. 52 to 54 and 55). Upon the authorities cited in our former brief and the reasons there given, as well as upon the reasons given in this brief, we submit that said twelfth prayer of defendants in error was properly granted by the trial court and sustained by the Court of Appeals.

EIGHTH AND ELEVENTH PRAYERS OF DEFENDANTS IN ERROR.

The plaintiff in error, in regard to these prayers, contends:

1st. That they submitted to the jury a mixed question of law and fact—*i. e.*, whether the plaintiff had acquired the right of common and public highway in Harewood road.

2d. That they submitted to the jury a pure question of law—*i. e.*, whether the plaintiff in error had done the acts complained of without the exercise of its lawful powers according to law.

Now, as to the first objection, we submit that the court, in its charge to the jury and in the prayers which it read to the jury as a part of its charge, instructed them fully, 1st, as to what facts would establish and constitute a statutory highway (Rec., pp. 48 to 50); 2d, as to what facts would establish and constitute a highway by prescription (Rec., pp. 50 to 52), and, 3d, as to what facts would establish and constitute a highway by dedication (Rec., pp. 54, 55), and not only told them how they were to determine whether or not there was a statutory highway, a prescriptive highway, or a dedicated highway, but also gave them the law which would enable them to determine the width of any such highway (Rec., pp. 52 to 54 and 55), and told them that these three ways of acquiring a highway were the only ways in which it was claimed by the plaintiff in error that it had acquired any highway (Rec., p. 48).

Surely, having elsewhere in its charge, and in the prayers read as part of the charge, covered the whole ground as to the acquisition of a highway in each and all the ways in which it was claimed by the plaintiff in error to have been acquired, the court was not obliged to repeat and again state in this particular prayer the same thing over again.

Surely it was enough to instruct them once as to the law on this or any subject without having to insert the same instruction as to the law in each and every prayer. We submit that there is nothing in this objection to the eighth prayer of defendants in error, because, as we have just pointed out, the court had fully and sufficiently covered that ground elsewhere in its charge to the jury and in the prayers which it read to them as part of its charge.

As to the second objection, that the eighth prayer submitted to the jury a pure question of law—*i. e.*, whether the plaintiff in error had done the acts complained of without the *exercise* of its lawful powers according to law—it is to be observed this transaction embraces and is divisible into at least two distinct parts or heads, viz :

1st. So much of the excavation as fell within the width and limits of its right of highway.

2d. So much of the excavation as was in excess of its right of highway.

As to both the court in its charge instructed the jury as follows :

"If you find a public road there, then the defendant *had the right to excavate to the width of the public road ;* but if they excavated *beyond the width*, then they would be liable for such excavation as they may make beyond the width of the public road" (Rec., p. 54).

As to the former, in its charge and in the tenth and eleventh prayers of defendants in error, the court further instructs the jury and tells them very clearly and distinctly not only what were the lawful powers of the plaintiff in error in respect to excavation within the width and limits of its right of highway and the removal of gravel therefrom and using the same upon other public roads, but also how the plaintiff in error *could exercise* its said powers according to law and how it could not exercise them.

The court instructed the jury upon this subject as follows, viz:

"There is one theory which plaintiffs have, and have urged upon the court and jury, that would entitle them to recover for the entire excavation there, even though you should find that there was a public road of the whole width of thirty-three feet, and that theory is that the authorities of the District, although there might be a public road there, would have no right to take away the soil and gravel and dig a trench through there and remove the soil and gravel for the *sole purpose of using it some place else*, and if they did that, although there was a public road there, they would be liable; that if there was a public road there, while they might have the right to grade it, *and if they did grade it*, would have the right to use the soil elsewhere *without any liability*, yet they had no right to take the soil away *as a principal object* WITHOUT ANY REFERENCE TO OR INTENT TO GRADE THE PARTICULAR POINT WHERE THEY TOOK IT AWAY FROM. Upon that point two instructions have been granted for the plaintiffs. They are numbered 10 and 11 in their series, and I now read these:

"'If the jury shall find from the evidence that the defendant *was in want of gravel for use on the public roads*, and that *one* of its Commissioners was applied to and directed the excavation on the land of the testator of the plaintiffs *for the purpose of obtaining such gravel*, and that said gravel *was accordingly obtained and used*, then in the absence of evidence that such gravel *was the result of the exercise of the judgment and discretion of the Commissioners of the defendant* DIRECTING THE GRADING OF THE HIGHWAY BY MEANS OF SUCH EXCAVATION, it was *unlawful* to make such excavation and take the gravel *without compensation*.'

"And the eleventh reads in this way:

"'The burden of proof is upon the defendant to satisfy the jury that the gravel obtained *was incident to the legal exercise of the power* to grade. Such power, *to be lawful, must have been exercised by the Commissioners* JOINTLY. It could not be exercised by any *one* of the said Commissioners, AS THE POWER COULD NOT IN LAW BE DELEGATED. If the gravel obtained and used *was not incident to the exercise of the power to grade*, but was obtained *without the lawful exercise of the power to grade*, then the use of the said gravel, as well as the said

excavation, was *unlawful*, and the defendant has not maintained its plea of justification.'

"Now, I read you modification of both of those instructions in this language:

"'If the evidence shows to the satisfaction of the jury that said grading or the removal of said gravel was done under the supervision of the officers of said defendant and by its employés, it will be competent for the jury to *presume* from this fact that it was *authorized and directed* BY THE JOINT ACTION *of the Commissioners of the defendant*, unless there be evidence that satisfies them *that the contrary is the fact*.' In other words, there was no necessity of any written resolution or written order signed or concurred in by all the Commissioners. You have the right to *presume* from all the evidence in the case, if you believe the fact to be so, that the Commissioners *all concurred in and authorized this grading*, and from the fact that it was done, if you find it to be a fact, by the officers and agents of the defendant who usually attend to business of that character, you will be authorized in *presuming* from those facts that the Commissioners *did authorize it jointly*, unless there is *some evidence* in the case THAT WOULD REBUT THAT PRESUMPTION.

"Now, to make that instruction clear to you, it means that if the Commissioners wanted to repair the roads in some other localities, and *did not want, did not have any idea of grading this particular place, and did not want to do it*, and removed this gravel from that place FOR THE SOLE PURPOSE of using it some place else, then the District *is liable*, for they had no right to remove that soil and gravel for any other purpose THAN TO GRADE. If, on the contrary, *they wanted to grade that particular locality*, then they had the right to use it elsewhere and are *not liable*—that is if you find that there was a public road there" (Rec., pp. 56, 57).

We submit that the charges and instructions quoted above not only with remarkable clearness and fullness instructed the jury as to what were the lawful powers of the plaintiff in error within the width and limits of its right of highway, but also with equal clearness and fullness instructed them as to how and when the defendant could and how and when it could not exercise those lawful powers.

In chapter XII of our former brief (pp. 190 to 241), which we request you to read, we treat fully and at large of power to grade; of its involving judgment and discretion; of its not being able to be delegated; that where it is within the corporate power and might have been lawfully accomplished had the corporate authorities proceeded according to law the corporation will be liable as a wrong-doer in an ordinary action at law for the acts of its officers and servants proceeding contrary to law; that the public authorities, without exercising such power to grade that highway cannot obtain gravel or soil therefrom to repair or improve other highways. The authorities there cited all support the trial court in the case at bar.

In the next place, so far as the excavation was in excess of its right of highway, said eighth prayer itself instructs the jury that without making just compensation to the owner of the soil or having any condemnation proceedings, the defendant would be liable as a trespasser for so doing. As the uncontradicted evidence was that there had never been any condemnation proceedings whatsoever, it was unnecessary for the court to instruct them any farther upon that subject.

We respectfully submit that what we have said shows beyond controversy the eighth (8th) and eleventh (11th) prayers of the defendant in error were properly granted, and that the jury were fully instructed as to the matters of law contained therein. The same is true of the modifications complained of by plaintiffs in error in their ninth prayer (Rec., p. 45). The same questions are thereby raised and are met by the same answer.

THE ACTS COMPLAINED OF WERE NOT *ultra vires*.

"*In any case where materials of any kind shall be deemed necessary for making or repairing a public road, if the proper authorities cannot agree with the owner as to their purchase, such materials may be condemned in the manner as provided for in*

this chapter in cases of condemnation of land for the purposes of a public road."

R. S. D. C., ch. 11, § 267, p. 30.
Compiled Statutes, ch. 29, § 22, p. 269.

Under this statute ample power unquestionably existed (by having such condemnation proceedings) to excavate and remove the gravel both from *beyond* the limits of the highway and from *within* the limits of the highway.

Beyond the limits of the highway they could only lawfully excavate and remove gravel by having such condemnation proceedings, and thereby paying just compensation to the owner of the soil not only for the gravel removed, but also for the injury to the tract resulting from the pit, trench, or excavation made by removing the material therefrom. *Within* the limits of the highway they could pursue precisely the same course, if they preferred doing so, *without exercising their power to grade said highway at that place;* or they could exercise their power to grade said highway at that particular place and to use the gravel removed therefrom upon other highways *in the same system of improvement.*

A highway cannot be said to be in the same system of improvement with another or other highways unless the board or tribunal in which the power to improve them is vested has exercised its judgment and discretion as to the intended improvement of such highway and has decided upon the same, as well as upon the improvement of the other or others. When the power to improve both or all has been exercised and their improvement decided upon by the board or body invested with that power, they may then be said to belong to the same system of improvement. Upon this whole subject we refer you to chapter XII of our former brief (pp. 190 to 241) and to the authorities there cited.

It is also there shown that wherever power exists to do a thing, either by condemnation and making just compensation or by pursuing a mode authorized and prescribed by

law, and the party having such power does such thing without such condemnation and compensation or without pursuing such mode authorized and prescribed by law, it will be an illegal and tortious act, but not *ultra vires*.

In the case at bar there is no proof that the power to grade (if it existed) was ever exercised by the Commissioners according to law, or ever so much as attempted to be exercised by them at all. There is evidence tending to show that they had determined upon the macadamizing, repairing, or improving of Seventh Street road, and needed gravel for carrying out and completing such work on Seventh Street road, but there is nothing to show that they had determined upon any grade or improvement of Harewood road. On the contrary, there is a good deal to show that their only purpose and object was *not* to grade or improve Harewood road, but *solely* to get gravel for a top dressing to the McAdam roadway on Seventh Street road. The facts and circumstances which show or tend very strongly to show that such was the case will be found grouped together and summed up in our former Brief (pp. 229 to 235), to which we refer you. If you will only look at them you must concede that the question of whether or not the acts complained of were done incident to the exercise of the power to grade Harewood road or *solely* for the purpose of getting gravel for other public roads, *without any exercise* of the power to grade this particular road, was left fairly to the jury, and we submit, upon the authorities, that it was properly left to the jury, and that the evidence in our former Brief (pp. 229 to 235), to which we have referred you, was abundantly sufficient to sustain their verdict in favor of defendants in error on that question. We do not see how any jury could find the other way on such a showing.

The plaintiff in error says there was error in allowing the jury to consider the motives of the Commissioners in grading Harewood road. This is a very subtle and misleading suggestion. It looks very much as though it lacks sincerity,

and is merely intended to deceive. The jury were allowed to consider the evidence which had been submitted to them, and to decide upon it whether the Commissioners, jointly or as a board, had exercised any power to grade Harewood road at all or not. If they found *that such power had been exercised*, they were not permitted to go into the motives or wisdom or *bona fides* of the Commissioners at all. They were merely to determine *whether the power to grade had been exercised or not*. If they found it had been exercised, then, irrespective of the motives, purpose, *bona fides*, &c., of the Commissioners, what was done under the exercise of such power to grade was lawful, but otherwise if they found it had not been exercised.

The case of R. R. Co. *vs.* Defiance, 167 U. S., 102, is cited to the point where the common council of Defiance had passed an ordinance changing the grade of certain streets, and it was argued that the discretion of the common council was not wisely exercised. It was held that the court was not at liberty to inquire whether the discretion vested in the common council was wisely exercised or what the motives were for making the change, inasmuch as they had power to make it. Surely this case is no authority for holding that where Commissioners are vested with a power to grade a jury will be precluded from or denied the right of determining from the evidence whether they have *exercised such power or not*.

23D PRAYER OF PLAINTIFF IN ERROR.

This prayer is fully and sufficiently considered in chapter XIV of our former Brief, and it is unnecessary to add anything to what is there said, except to say that if you will only look at the strong and convincing evidence which is collected and grouped together in our former Brief (pp. 229 to 235) you cannot doubt but what a jury would be satisfied that the fact was just the opposite of said assertion in said answer.

INTEREST.

This case from beginning to end has been a hotly contested one, and the delays since its institution are partly due to indulgence extended on different occasions to first one and then another of the attorneys for the plaintiff in error, who, because of press of other business, desired delay, and partly to the bitter fight with which the defendants in error have been met at all stages by their adversaries. Surely, the damages sustained at the time of the commission of the trespasses would be but poor compensation after being kept out of it for over 18 or 19 years.

This question and the law applicable to the same will be found in chapter XIII of our former Brief (pp. 241 to 257).

The other prayers and questions concerning them are, we believe, sufficiently discussed and treated of in our aforesaid former Brief, to which we refer the court.

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